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IN THE

Supreme Court of the United States

No. 616

FEBRUARY TERM, 1950

In the Matter of the Application
of
THE PLAINFIELD HOTEL CORPORATION
for a Writ of Certiorari,

Petitioner,

against

THE CITY OF BUFFALO,

Respondent.

BRIEF OF RESPONDENT—CITY OF BUFFALO.

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THE CITY OF BUFFALO,

Respondent.

BRIEF OF RESPONDENT—CITY OF BUFFALO.

Statement.

This is an application, on behalf of the Plainfield Hotel Corporation, to review on Writ of Certiorari, a decision of the United States Court of Appeals, Second Circuit, which affirmed an order of the United States District Court for the Western District of New York, (granted September 14, 1948, Honorable John Knight, Presiding Judge,) which

order denied a motion of said Plainfield Hotel Corporation to remove an action from the County Court, Erie County to the said United States District Court for the Western District of New York.

The petitioner sought to remove the suit, hereinafter described, upon the ground

> "* * * that on account of prejudice and local influence in favor of plaintiff and adverse to your petitioner, petitioner will be unable to obtain justice in said County Court of the State of New York, or in any Court of said State to which by the laws thereof, your petitioner may have recourse. That said prejudice or local influence arises from the following facts. That plaintiff is represented by persons of local political influence, and the persons comprising the said Court and its constituents are prejudiced against petitioner because it is a corporation of another state, and local people desire to buy in the property sought to be foreclosed at a very low price on a so-called tax sale."

This petition to remove was verified August 2, 1948. It was filed in the District Court, August 16, 1948. While the motion to remove was not passed on by the District Court until after September 1, 1948, the day when *new* Title 28 took effect, the Courts below were warranted in holding that the *old* law, (Title 28, Sec. 71, Judicial Code) and not the *new*. (Sec. 1441 *et seq.* of the *new* Title 28 U. S. Code), was applicable to the decision of petitioners motion to remove.

Petitioner moved for a rehearing on October 25, 1948, said motion being based upon the affidavits of F. Dudley Kohler, one verified October 13, 1948, and one verified November 20, 1948. The City of Buffalo opposed this motion, reading the affidavit of Adon W. Crosby, Assistant Corporation Counsel, verified January 5, 1949. The Dis-

trict Court, by its order dated January 18, 1949, denied this motion for a rehearing. Petitioner moved, a second time, for a rehearing on January 25, 1949, basing its motion upon an affidavit of F. Dudley Kohler, verified, January 15, 1949. The City of Buffalo opposed this motion, reading the affidavit of Adon W. Crosby, verified January 21, 1949. The District Court, by its order dated January 25, 1949, again, denied the motion for a rehearing. This order was filed, entered and sent to the attorney for the petitioner on January 26, 1949.

Petitioner appealed from the order of September 14, 1948, denying its motion to remove, on October 13, 1948 (Fol. 7).

Petitioner filed and served a Notice of Appeal from the other two orders, denying rehearings, on March 2, 1949 (Fol. 12). This Notice was not served in time, so the appeal from those orders is not effective. See Sec. 2107 of New Title 28, United States Code in effect September 1, 1948.

Petitioner failed to print in the record its application for removal, and the affidavit of Adon W. Crosby, verified January 21, 1949, opposing the second motion for a rehearing. So we printed said papers in a supplemental record (Fols. 189, 192).

Petitioner's appeals were duly brought on for argument before the United States Court of Appeals, Second Circuit. After hearing, the latter Court, on or about November 2, 1949, affirmed the order of the District Court.

Petitioner, later, filed a petition with the United States Court of Appeals, Second Circuit for a rehearing. This petition was denied on or about November 22, 1949.

The Petition for a Writ of Certiorari, together with Record, and the Brief in support thereof, were received by this Respondent, City of Buffalo on or about March 2, 1950.

The Action in County Court Which Petitioner Seeks to Remove.

This action was brought in County Court, Erie County by the City of Buffalo, Plaintiff against the Plainfield Hotel Corporation, Spann Realty Corporation, E. W. Walter, as nominee of Central Hanover Bank and Trust Company, Thomas J. Atcheson, doing business under the assumed name and style of T. J. Atcheson Glass Co., State Tax Commission, The People of the State of New York, Buffalo Sewer Authority, County of Erie, defendants, for the purpose of foreclosing tax liens (for the years 1931 to 1945, both inclusive) against certain vacant property in said City owned by the Spann Realty Corporation (Fol. 58). The petitioner was made a party defendant because, according to the public records, it was the owner of a mortgage, hereinafter described, on said property (Fols. 120, 125).

The Spann Realty Corporation was made a defendant because it owned the property involved in the action. It was a domestic corporation and a resident of the State of New York (Fol. 134). The defendants, E. W. Walter, as nominee of Central Hanover Bank and Trust Company, Thomas J. Atcheson, State Tax Commission, The People of the State of New York, Buffalo Sewer Authority and County of Erie were made parties because they were lienors. They, also, are residents of the State of New York (Fol. 30).

The action was brought pursuant to Article 32 of the Charter of the City of Buffalo (Fol. 58). Section 642 of the Charter makes applicable, to an action of this character, all provisions of law applicable to the foreclosure of mortgages. The summons and complaint and *lis pendens* were filed in the office of the Clerk of Erie County, New York, on the 22nd day of October, 1946. The summons and complaint was served on the petitioner on the 24th day of February, 1947 (Fol. 31). No answer was interposed by any defendant.

The petitioner moved in said County Court to vacate the service of the summons upon it, "on the ground that it was not legally served * * *." This motion, after a hearing, was denied by said County Court by order dated, May 5, 1947. The petitioner appealed from said order to the Appellate Division of the Supreme Court, State of New York, which Court affirmed the order of the County Court (Fols. 46, 47).

Buffalo v. Plainfield Hotel Corp., 273 App. Div. 802.

Petitioner never filed a general notice of appearance (Fol. 27). Neither did it file an answer, nor make any motion addressed to the complaint, except the motion it made, under date of May 25, 1948, to open its default. This motion we later refer to (Fols. 50, 195).

On or about February 10, 1948, this action was referred by said County Court to a referee to hear, try and determine the issues, if any herein, to compute the several amounts due to the plaintiff and to the defendants, County of Erie and Buffalo Sewer Authority on the liens alleged in the complaint; to determine their priority; to examine the plaintiff and the defendants County of Erie and Buffalo Sewer Authority as to payments; to take proof of the

facts and circumstances stated in the complaint. In accordance to this order, a hearing was duly held before said referee, and the referee made his report which is dated April 22, 1948, and filed in the Erie County Clerk's Office on the 30th day of April, 1948; upon said report, said County Court granted a judgment of foreclosure and sale in accordance with the practice of said Court, which judgment was duly entered in the Erie County Clerk's Office on the 30th day of April, 1948 (Fols. 60, 61).

In pursuance to the judgment of foreclosure and sale, the property was advertised to be sold on the 26th day of May, 1948. The petitioner was not legally entitled to notice of this sale. However, F. Dudley Kohler, Treasurer of petitioner, knew from a letter of the Clerk of Erie County, dated May 7, 1948, that the Judgment Roll had been filed on April 30, 1948 (Fol. 48). Said Kohler knew of the sale. He attended same and participated in the bidding (Fol. 62).

On the 25th day of May, 1948, the day before the sale, said Kohler, on behalf of said petitioner, and as treasurer thereof, obtained an order directing the plaintiff to show cause, "why an order should not be made opening the default and the judgment entered thereon and vacating and setting aside the same, why the petitioner should not be granted leave to answer the complaint, and why all proceedings on the part of the plaintiff should not be delayed." Said order contained a stay of proceedings (Fols. 63, 199). This order was granted, by a judge out of court, without notice, and in violation of Rule 260 of Civil Practice (New York State) which rule provides: "No order to stay a sale under judgment for the foreclosure of a mortgage shall be made by a judge out of Court, except on a notice of at least twenty-four hours to the plaintiff's attorney."

The motion was heard on May 25, 1948 by consent, although not returnable until May 27, 1948. F. Dudley Kohth e order of the County Court dated May 25, 1948 as folth eoredr of the County Court dated May 25, 1948 as follows:

> "• • • ORDERED, that the motion of the defendant. Plainfield Hotel Corporation, to open its default and for permission to answer the complaint be and the same is hereby denied." (Fols. 64, 65.)

No proposed answer was served or filed on said motion or at any other time. No defense was set up by affidavit, and no excuse was given for petitioner's default in pleading. It is apparent that the default of the petitioner was deliberate.

The sale was held as advertised. The property was bid in by, and sold to, the City of Buffalo for the sum of $15,000. The sale was attended by said F. Dudley Kohler, Treasurer of the petitioner, who participated in the bidding, his highest bid being the sum of $14,100 (Fol. 62).

An appeal was taken by petitioner from the County Court order of May 25, 1948, which refused to open its default, to the Appellate Division of the Supreme Court. The appeal was heard and the order of County Court affirmed.

See

City of Buffalo v. Spann Realty Corp., 274 App. Div. 1085.

Misstatements of Fact Made by Petitioner.

Petitioner makes several misstatements in the record to which we call attention.

On pages eight and twelve (Fols. 22, 34) is states, it offered payment in full of the taxes being foreclosed. There

is no evidence of this in the record. No such offer or tender was made.

At several points petitioner states or implies it is the owner of the property involved in the action (Fols. 34, 114). Petitioner was a mortgagee, not the owner (Fols. 120, 124). Petitioner sold its mortgage before it made the motion to remove (Fol. 135). It, thus, divested itself of all interest in the property.

On page eight of its brief, and at folio 127 of the record, petitioner speaks of its "proposed answer." No answer, "proposed or otherwise," was served or filed.

On page 43 of the record (Fol. 129) Mr. Kohler, Treasurer of petitioner states he did not know the property was to be sold until the day before the sale. It appears, however, that he had received a letter on May 7, 1948 telling of the entry of judgment on April 30, 1948 (Fol. 49). It further appears, that he participated in the bidding at the sale (Fols. 62, 130).

The Statute Applicable.

This motion to remove was made in August, 1948 (Fol. 3). We, therefore, take it for granted that the statute which governs is Title 28, Section 71, Judicial Code and Judiciary. The material part of Section 71, reads as follows:

> "And where a suit is brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, *at any time before the trial thereof, when it shall be made to appear to said district court* that from prejudice or local influence he will not be able to obtain justice in

such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

Pursuant to this statute, one seeking to remove a suit from a State court to the district court of the United States, must show:

1. That, in such suit, "there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State."

2. That the party seeking to remove suit is a defendant and a citizen of "another State."

3. That application is made "at any time before the trial thereof."

4. That "it shall (on said application) be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court,

5. or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice and local influence, to remove said cause."

New Title 28 Judicial Code.

We are aware that this section has been materially changed by Sec. 1441 *et seq.* of the new Title 28, U. S. Code, which went into effect on September 1, 1948. However the changes do not aid the petitioner. This new Title 28 forecloses the right of petitioner to remove more clearly, perhaps, than does the old law.

To show how little comfort the petitioner could gain from the new law, if it were applicable, we refer to Sec. 1441 (b), and Sec. 1446 (b) of the new title. Sec. 1441 (b) reads in part, "any other such action shall be removeable only if none of the parties in interest properly joined and

served as defendants is a citizen of the State in which such action is brought." The other section (1446 (b)) reads "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later."

See Revisers Notes under these Sections.

In this brief we are assuming that this new law is not applicable to the present case.

POINT I.

It appears from the record herein that the petitioner, Plainfield Hotel Corporation, had no interest in this law suit or its subject matter at the time it made its motion to remove in August, 1948 or at any other time since March 31, 1947.

In the original moving papers, there is no allegation, whatsoever, showing how the Plainfield Hotel Corporation was, if at all, interested in the action or the subject matter thereof (Fols. 30-56, 95).

On the motion for a rehearing, we find the statement made in the affidavit of F. Dudley Kohler, verified October 13th, 1948, viz.: "The plaintiff made the Plainfield Hotel Corporation a defendant, because it had a mortgage lien on the premises" (Fol. 120). This is no statement of petitioner's interest; it is a statement of the plaintiff's reason for making the Plainfield Hotel Corporation a party defendant. Again, in the affidavit of F. Dudley Kohler, verified November 20th, 1948, we find the statement: "Deponent was and is during all the time herein stated, the treasurer of the defendant, Plainfield Hotel Corporation, which held a first mortgage on the property described in the complaint" (Fol. 125). The defendant, significantly,

used the past tense "had" and "held." He, purposely, neglects to say that the Plainfield Hotel Corporation, "is, at present," the holder or owner of a mortgage. These statements are misleading, and, we think intentionally so.

The motion to remove was not made until August, 1948. The petitioner had divested itself of title to the land described in the complaint herein on the 7th day of August, 1940, by deed, to the Spann Realty Corporation, which was dated, June 21st, 1940 and recorded in the Erie County Clerk's Office in Liber 3019 of Deeds at Page 376, (p. 61 of Record). The Spann Realty Corporation gave back to petitioner and to one Charles G. Miller, a mortgage to secure the sum of $11,300, which mortgage was dated August 7th, 1940, and recorded on the same day, in the Erie County Clerk's Office, in Liber 2991 of Mortgages at Page 391. It appears that, later, the petitioner became the sole owner of said mortgage, and then, on March 31st, 1947, sold and assigned said mortgage to the Marion County Tennessee Cooperative Corporation, (p. 62 of Record). The said assignment of mortgage was recorded in the Erie County Clerk's Office on April 11th, 1947 in Liber 3806 of Mortgages at Page 391. It is apparent that the petitioner has had no interest in this action, or its subject matter, since March 31st, 1947; and that this fact was known to F. Dudley Kohler, the moving spirit on this motion to remove. F. Dudley Kohler signed, acknowledged and delivered the said assignment of mortgage as treasurer of said corporation, (p. 63 of Record).

(See affidavit of Adon W. Crosby verified January 5, 1949 at page 62 of Record).

It appears that petitioner has had no interest in the property involved since March 31, 1947. We fail to see, therefore, how it can claim, as it does in its record at page 8, that it is being deprived of its real property without due

process of law. It had no real property, or any interest therein, to be deprived of.

It should be noted that the Marion County Tennessee Cooperative Corporation became the owner of the mortgage in question after the foreclosure had been commenced, and, therefore could not have been made a party defendant. However, it became the owner of petitioner's interest before petitioner made its motion to remove. It does not appear whether or not the Marion County Tennessee Cooperative Corporation had any standing or right to make such a motion. From all that appear it may be a resident of New York State.

POINT II.

The attempt of the petitioner to remove this suit to the United States District Court (whatever the reason) comes too late and therefore must be denied.

This action was brought for the purpose of foreclosing tax liens owned by the City of Buffalo on real property in said City.

The action was started on or about the 10th day of October, 1946, in pursuance of Article 32 of the Charter of the City of Buffalo. The taxes had not been paid on the property involved, from the years 1931 to 1945 both inclusive.

The summons and complaint was served upon the petitioner who was made a defendant in this action because, according to the public records, it then held a mortgage lien on the premises. That on or about the 31st day of March, 1947, (the same day it assigned its mortgage, (Fol. 59)), the petitioner made a motion for an order vacating the service of the summons upon it, on the ground that it was not legally

served; this motion was denied by the County Court; thereupon petitioner appealed to the Supreme Court, Appellate Division, Fourth Department. Said Appellate Division affirmed the order of the County Court.

See City of Buffalo v. Plainfield Hotel Corp., 273 App. Div. 802.

The petitioner never filed a general notice of appearance.

A judgment of foreclosure and sale was duly entered herein in accordance with the practice of the County Court, on the 30th day of April, 1948 (Fol. 61). In pursuance to said judgment the property was duly advertised for sale under the direction of the Referee to sell, and, the property involved was, on or about the 26th day of May, 1948, sold to the City of Buffalo for the sum of $15,000.00, that being the highest sum bid therefor. That said sale was attended by Mr. F. Dudley Kohler, Treasurer of the petitioner, and he participated in bidding for such property; that his highest bid was the sum of $14,100.00 (Fol. 62).

On the day previous to the sale, petitioner obtained an order, signed by Hon. Leslie F. Robinson, Erie County Judge, directing the plaintiff to show cause why petitioner's default should not be opened, why the judgment entered herein should not be vacated, why petitioner should not be granted leave to answer the complaint, and why all proceedings on the part of the plaintiff should not be stayed, and providing that, until the hearing and final determination of said motion and the entry of an order thereon, all proceedings on the part of the plaintiff, be stayed (Fols. 63, 64). This motion was made upon the affidavit of said F. Dudley Kohler, verified May 24, 1948. It was argued before said Judge Robinson by said F. Dudley Kohler, on behalf of said petitioner, and Adon W. Crosby on behalf of the plaintiff. The petitioner's motion was denied. The pe-

titioner appealed to the Appellate Division of the Supreme Court, Fourth Department, where said denial was affirmed (Fol. 65).

See City of Buffalo v. Spann Realty Corp., 274 App. Div., 1085.

It thus appears that this motion to remove was not made until after the "trial" of this action. See Title 28 of Judicial Code (U. S. C. A.) Sec. 71.

The phrase "at any time before the trial", means in this case at least, before the case went to judgment.

In McCallon v. Waterman, (C. C. E. D. Mich.), Fed. Case No. 8,675, the court, interpreting the words "before or at the term at which said cause could be first tried, or before the trial thereof" contained in Section 3 of the Judiciary Act of 1875, said:

> "In a defaulted case there is no trial in the ordinary sense in which that word is used; but at the same time there is undoubtedly a limit to the time within which such a case may be removed to this court * * * The default, which is an admission of the plaintiff's case, stands in the place of a trial in a litigated action, which is only a determination of the issues made by the pleadings of both parties. As vacating a default is a matter of discretion, it seems proper that the discretion of the court, which caused the defaults to be entered, should be invoked to set it aside." 15 Fed. Cases, pp. 1248-1249.

The Court held that the petition for removal was prematurely filed and remanded the case to the State Court for further proceedings. In that case it is said: "Plaintiff's attorney entered the appearance of defendant, July 6, 1876, and on the 22nd day of the same month took his default for not pleading to the declaration." Id., p. 1247.

This case is cited in City of Detroit v. Detroit City Ry. Co., (C. C. E. D. Mich.) 54 F. 1, 8, where it is said:

"If the order *pro confesso* had been taken on a personal and actual service, the argument would have been unanswerable, for it is clear that generally a hearing on a default is a trial, within the meaning of the Removal Act of 1875."

In Neale v. Foster, (C. C. D. Or.), 31 F. 53, petition for removal was made on ground of prejudice and local influence under Section 2 of the Judiciary Act of 1887. Defendant answered and plaintiff replied. The application was denied. The Court said: "The statute provides that it may be made 'at any time before the trial'. Ever since this case was referred to the master, with directions to take the testimony, and find the facts and conclusions of law arising thereon, it has been on trial" (p. 56).

When a party is in default, before he can put himself in a position to ask for the removal of a case to the United States Court, he should first by proper motion, relieve himself of his default. This is what was done in Harter v. Kenochan, 103 U. S. 562.

"The Supreme Court have interpreted this to mean: 'before or at the term at which the cause could first be tried, and before the trial thereof;' and also, as, before or at 'the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations.'" Fisk v. Henarie, 142 U. S. 459, 466.

POINT III.

The application to remove should be denied because "prejudice" or "local influence," as contemplated by the statute, is not shown.

The petitioner states as a ground for asking the removal of this suit, "that on account of prejudice and local influence in favor of plaintiff and adverse to your petitioner,

petitioner will be unable to obtain justice in said County Court of the State of New York, or in any Court of said State to which by the laws thereof, your petitioner may have recourse. That said prejudice or local influence arises from the following facts. That plaintiff is represented by persons of local political influence, and the persons comprising the said Court and its constituents are prejudiced against petitioner because it is a corporation of another state, and local people desire to buy in the property sought to be foreclosed at a very low price on a so-called tax sale" (Fol. 36).

A careful reading of the record indicates, however, that the petitioner's claim of "prejudice and local influence" is really based upon his failure to have matters decided, in the State Courts, in its favor (Fols. 114, 120, 130, 159). It is not alleged that the County Court was, in anyway, biased, or that it made any ruling based upon any improper or ulterior motive. No hostility or feeling against the appellant, on any ones part, has been shown.

See Adelbert College v. Toledo, etc., Ry. Co., 47 Fed. Rep. 836, 843, (1891) where the Court quoted Webster's definition of "prejudice" as follows:

> "An opinion or decision of mind formed without due examination; pre-judgment; a bias, or leaning towards one side or the other of a question from other considerations than those belonging to it; an unreasonable predilection or prepossession for or against anything; especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge."

and then said:

> "It is in this general sense that the removal acts use the word 'prejudice,' and it cannot properly be applied to the solemn judgment of the highest court of a state on the mere ground that said judgment differs from that of the supreme court of the United States on the

same question. The term 'local influence,' if not synonomous with 'prejudice,' manifestly refers to an improper influence exerted by or existing in favor of one side, or against the other, which will prevent the latter from obtaining justice in the state courts. The 'prejudice or local influence' which the law meant to make the grounds of removal may relate to the person of the litigant or the subject-matter of the litigation; but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility in the local community or courts, which will work injustice, or prevent the party seeking a removal from obtaining justice."

The Court "must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that, by reason of those causes (prejudice or local influence), the defendant will not be able to obtain justice in the State Courts." Fish v. Henaire, 142 U. S. 459, 468. To the same effect, see Bellaire v. B. & O. R. R., 146 U. S. 117, 118.

An affidavit that defendant has no acquaintance in the county in which the trial in the state court will be had, and that plaintiff is well known there as a lawyer and politician, having lived and practiced law at the county seat many years, and having been a candidate for the office of attorney general of the state, does not make a case for removal. Dennison v. Brown, (C. C. N. Y. 1189) 38 F. 535.

Where prejudice and local influence are relied on as ground for removal they must be proved to the satisfaction of the federal court. City of Bellaire v. Baltimore & O. R. Co., (Ohio, 1892) 146 U. S. 117, 13 S. Ct. 16, 36 L. Ed. 910.

The application must be supported by such proof as to satisfy the court of the truth of such allegations. Southworth v. Reid, (C. C. Wis. 1888) 36 F. 451.

The court should hear evidence pro and con, if necessary, to decide thereon as to the existence of such preju-

dice or influence, before entertaining jurisdiction on the merits. Carson & Rand Lumber Co. v. Holtzclaw (C. C. Mo. 1889) 39 F. 885, 886.

A simple declaration of an opinion or conclusion in an *ex parte* affidavit which does not disclose the facts upon which the conclusion is founded, should not be accepted as satisfactory evidence of the existence of local prejudice. Schwenk v. Strang (Neb. 1893) 59 F. 209, 19 U. S. App. 300, 8 C. C. A. 92.

The existence of prejudice or local influence which will prevent a defendant from obtaining justice in a state court and authorize removal of the suit into the federal court under this section must be made to appear to such court by proof suitable to the nature of the case. Golightly v. Massachusetts Bonding & Insurance Co. (D. C. Tex. 1924) 295 F. 153. We quote from the opinion in this case as follows:

> "The 'justice' which the defendant must be prevented from obtaining in the state court to entitle him to a removal is certainly not a judgment or decree in his favor. It does not mean any particular result in the case, but it does mean the 'influences' which will operate upon the tribunal during the time of its decision. In other words, every defendant, as well as every plaintiff, for that matter, has the right to obtain a hearing and a decision by a court wholly free from and not exposed to the effect of a prejudice or local influence.
>
> If the United States court is legally, not merely morally, satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain that sort of justice in the state court, then removal will be ordered.
>
> Such legal satisfaction requires some proof suitable to the nature of the case. This proof may be made by affidavits; by oral oath; setting forth a statement of facts which evince, to the mind of the court, the truth of the allegation. City of Detroit v. Detroit (C. C.)

54 Fed. 1; *Ex parte* Pennsylvania, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; City v. Wright (C. C.) 84 Fed. 836."

The Supreme Court of the United States has held in, *In re* Pennsylvania Company (Bradley, J.) reported in 137 U. S. 451, 457, as follows:

"There is another question raised in this case, on which it is proper that we should express our opinion. It arised upon the following words of the Act: 'When it shall be made to appear to said circuit court that from prejudice,' etc. How must it be made to appear that from prejudice or local influence the defendant will not be able to obtain justice in the state court? The Act of 1867 only required an affidavit of the party that he had reason to believe that from prejudice or local influence he would not be able to obtain justice in the state court. Rev. Stat. § 639, art. 3. By the Act of 1887 it must be made to appear to the Court. On this point, also, various opinions have been expressed in the circuit courts. *Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court.* Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person, and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. *The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient.* If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered.

In view of these considerations, we are disposed to think that the proof of prejudice and local influence in this case was not such as the circuit court was bound to regard as satisfactory. The only proof

> offered was contained in the affidavit of the general manager of the defendant corporation, to the effect that, from prejudice and local influence, the Company would not be able to obtain justice in the Court of Common Pleas for Litchfield County, or any other state court to which, etc., We do not say that, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient." (Italics ours.)

In the case at bar, the District Court was not "satisfied, by the proof", offered, of the truth of the allegation that, by reason of "prejudice or local influence", the defendant will not be able to obtain justice in the Courts of the State of New York.

POINT IV.

There is no controversy between the plaintiff and the petitioner.

In making this point, we leave out of consideration for the moment, that the petitioner divested itself of all interest in this suit. We have discussed that in Point I. We refer now to the fact that the petitioner has no defense to the plaintiff's cause of action. It filed no answer.

Under the provision of the act of 1875 authorizing removal of any suit "wherein the amount in dispute," etc., exceeds $500, there must be an actual controversy between the parties to warrant a removal, and consequently there is no right of removal, after a stipulation has been filed in the state court admitting the claim sued upon. Keith v. Levi (C. C. Mo. 1880) 2 F. 743, 1 McCrary, 343.

And where the petition for removal was presented after defendant's time to answer had expired, and he was in default, it was held that there was no controversy between

him and the plaintiff, within the meaning of the statute, so as to make a case for removal. Berrian v. Chetwood (C. C. N. Y. 1881) 9 F. 678.

In Iowa it was held that the act of 1875, providing for removal to the federal courts of civil suits, wherein there is a controversy between citizens of different states, contemplates an actual controversy, and that a suit could not be removed thereunder by a defendant before filing a demurrer or answer. Stanbrough v. Griffin (1879) 52 Iowa 112, 2 N. W. 1011, Flynn v. Des Moines & St. L. Ry. Co. (1884) 63 Iowa, 490, 19 N. W. 312, following Bosler v. Booge (1880) 54 Iowa, 251, 6 N. W. 301.

And in New York it was held where a summons had been served upon a non-resident in New York, and an order obtained for his examination under Section 872 of the N. Y. Code of Civil Procedure, but no complaint filed or served and the defendant appeared generally, and obtained a stay and an order to show cause why the case should not be removed to the U. S. circuit court,—that the proceedings to remove were prematurely taken, and the motion was denied without prejudice to its renewal. Shepard v. Conrad, (N. Y. 1878) 4 Abb. N. C. 254.

POINT V.

Petitioner must, however, under Title 28, Section 71, go further and show that "there is a controversy between a citizen of the state in which the suit is brought–and–a citizen of another state," within the meaning of the cases which have construed said statute.

The construction we refer to, of course, is that enunciated in the case of Cochran v. Montgomery County (1905), re-

ported in 199 U. S. 260, 272. In this case, brought in the City Court of Montgomery, Alabama by an Alabama County against Cochran, a citizen of that state, and a surety company, a Maryland Corporation and surety on Cochran's bond, to recover damages for alleged breaches of the bond, the surety company petitioned for the removal of the case to the Federal Court alleging prejudice and local influence. The case was removed. After trial, judgment was rendered for the plaintiff County, which was affirmed by the Circuit Court of Appeals. On certiorari the Supreme Court reversed the judgment and caused the case to be remanded to the State Court. In its opinion the Supreme Court (Fuller, C. J.) said,

> "The circuit court was of opinion that the words 'any defendant, being such citizen of another state, may remove,' etc., implied that there might be defendants who were not citizens of another state and yet the cause be removable; but while the words, standing alone are susceptible of that construction, we think it was not intended to change the meaning of the terms as previously determined (by the decisions under the act of 1789, and so on down), and that the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is pending and a citizen or citizens of another or other states, and *that the clause did not include cases wherein the controversy was partly between citizens of the same state.* To hold otherwise brings the language of the clause into conflict with the rule that a suit, to be removable, must be within the original jurisdiction of the circuit court, departs from the settled former construction, and ignores the main purpose of the act of 1887, which was to restrict the jurisdiction of the circuit court. Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835, Anderson v. Bowers, 43 Fed. 321; Moon, Removal of Causes, § 189 and notes."

This case, Cochran v. Montgomery County, has since been followed, and expresses the law as it is today.

Armstrong v. Kansas City S. Ry. (C. C. Ark. 1911) 192 Fed. 608.

Indianapolis v. Chase National Bank, 314 U. S. 63.

Brown v. Hecht (D. C. Maryland, 1947) 78 Fed. Supp. 541.

In Armstrong v. Kansas City Southern Ry. Co., 192 Fed. Rep. 615 (Circuit Court, Ark. 1911) (Youmans, D. J.) the Court said, "Another ground on which removal is sought is that of prejudice and local influence against the railway company in the county in which the suit was brought, and in adjoining counties. In the case of Malone v. Richmond & D. R. Co. (C. C.) 35 Fed. 625, in an opinion rendered by Mr. Justice Harlan, this portion of the removal section was construed and applied as follows:

> 'The clause prescribing prejudice or local influence as ground for the removal of a suit "in which there is a controversy between a citizen and the state in which the suit is brought and a citizen of another state," cannot well be separated, in the process of interpretation, from the preceding clause in the same section, which, by referring to the first section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of suit in which the existence of prejudice of local influence, as effecting the right of removal, is of any consequence—that the matter in dispute shall exceed in value $2,000 exclusive of interest and costs.'

The limitation with regard to the amount in controversy was held to apply to that ground of removal. Later, in the case of Cochran v. Montgomery County, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, the rule in the Malone Case was held applicable to all cases involving diversity of citizenship. In the case of Southern Railway Company v. Thomason, 146 Fed. 972, 77 C. C. A. 170, the Court said:

'The settled construction of the act last quoted, under which this case was removed, is, we think, so far as the class of cases removable on the ground of prejudice and local influence is concerned, that they are confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is brought, and a citizen or citizens of another or other state, and it does not include cases wherein the controversy is partly between citizens of the same state.' "

As was said in Indianapolis v. Chase National Bank, 314 U. S. 66, (Frankfurter, J.), "To sustain diversity jurisdiction there must exist an 'actual' Helm v. Zarecor, 222 U. S. 32, 36, 56 L. ed. 77, 80, 32 S. Ct. 10, 'substantial,' Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U. S. 77, 81, 65 L. ed. 145, 148, 41 S. Ct. 39, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Strawbridge v. Curtiss, 3 Cranch (U. S.) 267, 2 L. ed. 435."

POINT VI.

We respectfully submit that no sufficient reason has been advanced to cause this Court to allow a Writ of Certiorari herein; and pray that the petition for such Writ be denied.

No unusual question is presented. The only question is, —Should the action have been removed from the County Court, Erie County, New York, to the United States District Court for the Western District of New York, because of or "on account of prejudice and local influence in favor of plaintiff and adverse to your petitioner * * *." This question was considered three times in the District Court, once on appeal by the United States Court of Appeals,

Second Circuit, and again by the latter Court upon a motion for a rehearing. In each case the question was decided against the petitioner.

The petitioner discusses many points of law in his Brief that are not material to the question here, viz.: Should the suit be reviewed in this Court by Writ of Certiorari? The questions petitioner presents are such as might be discussed before a trial Court, is properly raised. They are not such as will be considered as moving this Court to remove the cause from the State to the Federal Court.

In other words, petitioner has shown no reason why its contentions or defenses, if properly raised, would not have received in the State Courts, the fair and just consideration that is every litigant's due.

Respectfully submitted,

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